A

PP v. EMENIKA IZUNNA MADUABUCHUKWU

COURT OF APPEAL, PUTRAJAYA
ZAKARIA SAM JCA
ABANG ISKANDAR JCA
ZAMANI A RAHIM JCA
B [CRIMINAL APPEAL NO: B-05-54-03-2015 (NGA)]
23 NOVEMBER 2016

CRIMINAL PROCEDURE: *Appeal – Appeal against acquittal and discharge – Appeal by prosecution – Trafficking in dangerous drugs – Dangerous Drugs Act*
C *1952, s. 39B(1)(a) – Drugs found in two bags carried by accused person – Accused person denied knowledge of drugs – Defence of innocent carrier – Whether defence proven – Whether there was a third bag – Whether existence of third bag affected credibility of drugs found in two bags – Whether defence created reasonable doubt on prosecution's case*

D ***CRIMINAL PROCEDURE:*** *Admissibility – Exhibit – Trafficking in dangerous drugs – Dangerous Drugs Act 1952, s. 39B(1)(a) – Drugs found in two bags carried by accused person – Allegation of third bag during re-examination – Whether third bag affected credibility of drugs found in two bags – Whether third bag admissible as evidence – Whether third bag produced too late – Whether defence created*
E *reasonable doubt on prosecution's case*

EVIDENCE: *Conduct – Conduct of accused – Trafficking in dangerous drugs – Dangerous Drugs Act 1952, s. 39B(1)(a) – Drugs found in two bags carried by accused person – Accused looked nervous when police officer checked bags – Whether conduct signified knowledge of drugs – Evidence Act 1950, s. 9*

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The respondent was spotted emerging from the immigration counter of the Kuala Lumpur International Airport. He had checked in two bags which he had not collected. The police officer on duty ('PW2') accompanied the respondent to the 'lost and found' counter to collect his luggage and there, the respondent identified his two bags ('the bags'). The respondent behaved
G normally at first but looked nervous when PW2 expressed his wish to examine the bags. The respondent immediately denied that the bags were his. He also refused to open the bags when instructed to do so by PW2. PW2 proceeded to conduct a body search on the respondent and he found a set of keys. The keys were used to open the locks of the bags. A total of four
H packages were found in the bags and they were later confirmed by the chemist to contain a total of 2,749.8g of methamphetamine. The trace of DNA on the clothing items retrieved from the bags were also consistent with the DNA profiling of the respondent. The respondent was subsequently charged at the High Court for trafficking in dangerous drugs, an offence under
I s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA'). Satisfied that a *prima facie* case had been established, the trial judge called the respondent to enter his defence. In his defence, the respondent denied any knowledge of the drugs found inside the bags. According to him, the bags were given by an

acquaintance ('Olga') and he had no reason to suspect they contained anything illegal as the bags were opened and cleared by the customs in Lagos. The respondent further testified that his own personal clothing were brought in a separate bag ('exh. D60') but the same was not produced by the prosecution. In acquitting and discharging the respondent, the trial judge held that (i) the existence of exh. D60 affected the credibility of the prosecution witnesses; and (ii) the respondent had no knowledge of the drugs and his behaviour of being evasive, uncooperative and fearful could not raise an inference of knowledge of the drugs found because such conduct could easily be consonant with innocence and anger of being made use of by Olga. Hence, the present appeal by the prosecution.

Held (allowing appeal)
Per Zamani A Rahim JCA delivering the judgment of the court:

(1) The respondent was facing a charge where statutory presumption of trafficking was operating against him. In such a scenario, it will not be sufficient for the respondent to just raise a reasonable doubt in order to gain an acquittal. Where an accused person is faced with a statutory presumption, it is incumbent upon him in law, to rebut that statutory presumption on the balance of probabilities. (para 38)

(2) Exhibit D60 was physically adduced by the respondent during re-examination, which was very late in the day. Any evidence, especially important and material exhibit must be adduced at the earliest reasonable opportunity by the party desirous of admitting it as evidence in court. Merely by putting the matter of exh. D60 to the prosecution witness without more would not suffice. (paras 34 & 46)

(3) The origin of exh. D60 was suspect. The respondent allegedly surrendered exh. D60 to the prisons authority when he was admitted as a remand prisoner while awaiting trial. Apart from the oral evidence of the respondent who testified that he had brought exh. D60 from the prison on the day of trial, there was no clear and cogent evidence as to the whereabouts of exh. D60 prior to it being produced in court. No record of the same as having been inventoried by the prisons authority was adduced by the respondent. Neither was any prison officer in-charge of the inventory that kept and released exh. D60 called to testify and identify it. (paras 35 & 36)

(4) Apart from the issue of admissibility of exh. D60, the trial judge was in error when His Lordship ruled that the existence of exh. D60 had successfully cast a reasonable doubt on the prosecution case. The admissibility of a piece of evidence does not automatically equate impeccable credibility of the same. Its credibility must be subjected to it being tested with other admissible evidence adduced in court. It has to be considered in the totality of the evidence and not in isolation. (paras 40 & 41)

(5) Exhibit D60 and its production in court was a creation by the respondent. Exhibit D60 lacked credibility as it smacked of an afterthought. It could not cast any doubt on the veracity of the prosecution's evidence that there were only two bags seized and not three as alleged by the respondent. Exhibit D60 failed to rebut the statutory presumption of trafficking under s. 37(da) of the DDA that was invoked against him. It was clearly unreliable as a piece of evidence. Its probative value, at the highest, could only be regarded as being highly suspect. Such evidence could never rebut a statutory presumption. (paras 50 & 51)

(6) The respondent failed to rebut the prosecution's evidence of conduct under s. 9 of the Evidence Act 1950. The cumulative conduct of the respondent was consistent with his having known of the presence of the drugs concealed in the bags before their discovery, indicating a sense of guilt. It was not consistent with his innocence and frustration to vent his anger onto Olga who had duped him, contrary to the finding made by the trial judge. The conduct of being evasive, uncooperative and nervousness was consistent with the respondent's conduct of a deliberate refusal or reluctance to uncover the drugs which he knew were hidden in the bags. If his anger was targeted at Olga, it was reasonable for him to immediately burst out Olga's identity and particulars to PW2 when PW2 discovered the drugs in the bags. However, no such spontaneous and vehement protest came from the respondent. (para 53)

(7) The respondent's defence of innocent carrier was rejected. The trial judge's finding of no knowledge of the impugned drug by the respondent and the ordering of his acquittal at the conclusion of the trial was clearly against the weight of evidence. The trial judge's decision to acquit and discharge the respondent was set aside and substituted with the conviction and sentence of death by hanging. (paras 54, 57 & 58)

Bahasa Malaysia *Headnotes*

Responden dilihat keluar dari kaunter imigresen Lapangan Terbang Kuala Lumpur. Dia telah mendaftar masuk dua beg yang belum diambilnya. Pegawai polis bertugas ('PW2') menemani responden ke kaunter 'hilang dan jumpa' untuk mengambil bagasinya dan di situ, responden mengenal pasti dua beg ('beg-beg tersebut'). Responden berkelakuan biasa sahaja pada mulanya tetapi kelihatan cemas apabila PW2 ingin memeriksa beg-beg tersebut. Responden serta merta menafikan bahawa dia pemilik beg-beg tersebut. Dia juga enggan membuka beg-beg tersebut apabila diarahkan oleh PW2. PW2 seterusnya melakukan carian pada badan responden dan menjumpai sejambak kunci. Jambak kunci tersebut diguna untuk membuka kunci-kunci pada beg-beg tersebut. Sebanyak empat bungkusan dijumpai di dalam beg-beg tersebut dan kesemuanya disahkan oleh ahli kimia sebagai methamphetamine dengan jumlah berat 2,749.8g. Kesan DNA pada pakaian

yang diperoleh dari beg-beg tersebut sama dengan profil DNA responden. Berikutan itu, responden dipertuduh di Mahkamah Tinggi kerana mengedar dadah, satu kesalahan bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB'). Berpuas hati satu kes *prima facie* berjaya dibuktikan, hakim bicara memanggil responden membela diri. Dalam pembelaannya, responden menafikan apa-apa pengetahuan tentang dadah yang dijumpai di dalam beg-beg tersebut. Menurut responden, beg-beg tersebut diberi oleh kenalannya ('Olga') dan tiada sebab untuk responden mengesyaki beg-beg tersebut mengandungi barang salah kerana kedua-duanya dibuka dan melepasi kastam di Lagos. Menurut responden lagi, pakaiannya dibawa di dalam beg berasingan ('eks. D60') tetapi beg ini tidak dikemukakan oleh pihak pendakwaan. Dalam melepaskan dan membebaskan responden, hakim bicara memutuskan (i) kewujudan eks. D60 menjejaskan kredibiliti saksi-saksi pendakwaan; dan (ii) responden tiada apa-apa pengetahuan tentang dadah dan perilakunya yang mengelak, tidak bekerjasama dan takut-takut tidak membangkitkan satu kesimpulan bahawa dia tahu tentang dadah kerana perilaku ini selari dengan ketidakbersalahan dan kemarahan kerana diguna oleh Olga. Maka timbul rayuan ini oleh pihak pendakwaan.

Diputuskan (membenarkan rayuan)
Oleh Zamani A Rahim HMR menyampaikan penghakiman mahkamah:

(1) Responden berdepan dengan satu pertuduhan yang anggapan statutori pengedaran dilancarkan terhadapnya. Dalam keadaan ini, tidak cukup jika responden sekadar membangkitkan keraguan munasabah untuk dilepaskan. Jika seseorang tertuduh berdepan dengan anggapan statutori, wajib untuknya, bawah undang-undang, menyangkal anggapan statutori atas imbangan kebarangkalian.

(2) Ekshibit D60 dikemukakan secara fizikal oleh responden semasa pemeriksaan semula dan ini terlalu lewat. Apa-apa keterangan, khususnya ekshibit yang penting dan material mesti dikemukakan pada peluang terawal yang munasabah oleh pihak yang mengkehendakinya diterima di mahkamah. Sekadar mengemukakan hal perkara eks. D60 kepada saksi pendakwaan tanpa lebih adalah tidak cukup.

(3) Asal-usul eks. D60 diragui. Responden kononnya menyerahkan eks. D60 kepada pihak berkuasa penjara semasa dia dimasukkan sebagai banduan reman sementara menanti perbicaraan. Selain keterangan lisan responden yang menyatakan dia membawa eks. D60 dari penjara pada hari perbicaraan, tiada keterangan jelas lagi meyakinkan tentang tempat eks. D60 disimpan sebelum dikemukakan di mahkamah. Tiada rekod inventori oleh pihak berkuasa penjara tentangnya yang dikemukakan oleh responden. Tidak seorang pun pegawai penjara bertugas menyimpan inventori yang menyimpan dan melepaskan eks. D60 dipanggil untuk memberi keterangan dan mengenal pastinya.

(4) Selain isu kebolehterimaan eks. D60, hakim bicara juga terkhilaf dalam memutuskan kewujudan eks. D60 berjaya membangkitkan keraguan munasabah terhadap kes pihak pendakwaan. Kebolehterimaan secebis keterangan tidak, secara automatik, menjadikannya boleh dipercayai bulat-bulat. Kebolehpercayaannya tertakluk pada ujian dengan keterangan yang boleh diterima lain yang dikemukakan di mahkamah. Keterangan ini harus dipertimbangkan secara keseluruhan dan bukan berasingan.

(5) Ekshibit D60 dan pengemukaannya di mahkamah adalah rekaan responden. Ekshibit D60 tidak boleh dipercayai kerana ini satu fikiran semula. Ekshibit ini tidak membangkitkan keraguan munasabah terhadap kebenaran keterangan pihak pendakwaan bahawa hanya dua beg yang dirampas dan bukan tiga seperti yang didakwa oleh responden. Ekshibit D60 gagal menyangkal anggapan statutori pengedaran bawah s. 37(da) ADB yang dibangkitkan terhadapnya. Ekshibit ini jelas satu keterangan yang tidak boleh dijadikan sandaran. Nilai probatifnya, paling tidak, hanya sekadar dakwaan besar. Keterangan sedemikian tidak sekali-kali boleh menyangkal anggapan statutori.

(6) Responden gagal menyangkal keterangan pihak pendakwaan tentang perilaku bawah s. 9 Akta Keterangan 1950. Perilaku kumulatif responden selaras dengan pengetahuannya tentang kewujudan dadah yang tersembunyi di dalam beg-beg tersebut sebelum penemuannya, menunjukkan kebersalahan. Ini tidak selari dengan ketidakbersalahannya dan kekecewaan untuk mengajukan kemarahannya kepada Olga yang menipunya, berbeza dengan dapatan hakim bicara. Perilaku mengelak, tidak bekerjasama dan takut-takut selari dengan perilaku responden yang, dengan sengaja, menolak atau berdolak dalih untuk mendedahkan dadah yang dia tahu tersembunyi di dalam beg-beg tersebut. Jika kemarahannya disasarkan pada Olga, munasabah sekiranya responden mendedahkan identiti dan butiran Olga kepada PW2 semasa PW2 menjumpai dadah di dalam beg-beg tersebut. Walau bagaimanapun, responden tidak membuat bantahan spontan dan bersungguh-sungguh.

(7) Pembelaan pembawa tidak bersalah yang dikemukakan oleh responden ditolak. Dapatan hakim bicara tentang ketiadaan pengetahuan oleh responden dan perintah pembebasannya pada penghujung perbicaraan jelas bertentangan dengan berat keterangan. Keputusan hakim bicara untuk melepaskan dan membebaskan responden diketepikan dan diganti dengan sabitan hukuman gantung sampai mati.

Case(s) referred to:
Alcontara Ambross Anthony v. PP [1996] 1 CLJ 705 FC ***(refd)***
In re H (Minors) [1996] AC 563 ***(refd)***
Mirza Murtala v. PP [2010] 4 CLJ 150 CA ***(refd)***
Parlan Dadeh v. PP [2009] 1 CLJ 717 FC ***(refd)***
PP v. Yuvaraj [1968] 1 LNS 115 HC ***(refd)***
Tan Kim Ho & Anor v. PP [2009] 3 CLJ 236 FC ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 277
Dangerous Drugs Act 1952, ss. 37(da), 39B(1)(a), (2), First Schedule
Evidence Act 1950, s. 9
Prisons Regulations 2000, reg. 14

For the appellant - Samihah Rhazali; DPP
For the respondent - Ariff Azami Hussein; M/s Azizzul & Ariff

[Editor's note: Appeal from High Court, Shah Alam; Criminal Trial No: 45A-25-02-2012 (overruled).]

Reported by Najib Tamby

JUDGMENT

Zamani A Rahim JCA:

Introduction

[1] The respondent, Emenika Izunna Maduabuchukwu, was charged for trafficking in dangerous drugs, *to wit*, methamphetamines weighing 2,749.8g, an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 (the Act) and punishable under s. 39B(2) of the same Act. The charge reads as follows:

> That you on 9 October 2011 at about 2.45 am beyond the Immigration counter at Level 3, Terminal Building (MTB), KLIA in the District of Sepang, in the State of Selangor Darul Ehsan, did traffic in a dangerous drug, *to wit*, 2749.8 grammes methamphetamines and that you have thereby committed an offence under section 39B(1)(a) of the Dangerous Drugs Act 1952 and punishable under section 39B(2) of the same Act.

The Prosecution's Case

[2] On 9 October 2011 while on duty at the Kuala Lumpur International Airport (KLIA), Sepang, C/Insp. Didi Fairuz bin Zainal Abidin (PW2) was alerted by staff at the arrival hall of some unclaimed baggage.

[3] PW2 felt suspicious as at that time there were no arriving flights. PW2 and his men decided to keep a look out for any passengers emerging after undergoing immigration clearance.

[4] At about 2.45am, PW2 noticed the respondent emerging from the immigration counter. PW2 and his men approached him. On checking with the respondent, he was found to have checked in two bags. This was based

on two baggage claim tickets found inside the respondent's international passport of the Federal Republic of Nigeria, No. PP A03293304. At this point of time, the respondent behaved normally.

[5] The respondent confirmed to PW2 that he had not collected his luggage and as such PW2 and his men accompanied the respondent to the "lost and found" counter to collect the luggage.

[6] At the "lost and found" counter, the respondent identified his two brown Samsonite bags, exhs. P40 and P41 respectively. PW2 confirmed that the tags QR 310868 and QR 310867, exhs. P32 and P33 attached to the two bags tallied with the respondent's baggage claim tickets. Both exhs. P40 and P41 were registered in the name of the respondent.

[7] PW2 informed the respondent that he wished to examine the exhibits P40 and P41. On hearing this, the respondent's facial expression changed and he showed sign of nervousness. At the same time, the respondent denied that the exhs. P40 and P41 belonged to him, despite at the beginning he identified both bags exhs. P40 and P41 were his.

[8] PW2 then escorted the respondent to the narcotics examination room together with exhs. P40 and P41. At the narcotics room, PW2 noticed that both the bags were locked with small locks. PW2 asked the respondent to open the locks but the respondent did not co-operate. He refused to open the bags.

[9] Then PW2 proceeded to conduct a body search of the respondent and he found a small yellow/grey pouch bag written with the words "Qatar Airways", exh. P38 in the respondent's right trousers pocket. In exh. P38, PW2 found two key rings, exhs. P39(1) and (2) consisting of four keys. The keys were used to open the locks of the two Samsonite bags, exhs. P40 and P41.

[10] On opening the first bag, exh. P40, PW2 found it contained some clothing and having removed them, PW2 noticed a compartment at the base of the bag. On prying open this compartment, PW2 found two brown plastic packages, exhs. P15(1) and (2).

[11] The second bag, exh. P41 were also found to contain clothing and on further examination two brown plastic packages, exhs. P17(1) and (2) were found in the compartment at the bottom of the bag. All in all, four plastic packages were recovered. They were believed to contain impugned drugs.

[12] PW2 then prepared a search list, exh. P11 itemising all the exhibits seized from the respondent. The search list was signed by both PW2 and the respondent.

[13] On 9 October 2011, at about 7am, PW2 handed over the respondent and all the exhibits seized to the investigating officer (I.O), Insp. Eddy Amin bin Husin Ala (PW4). All the exhibits were marked by PW4 and thereafter he kept them under lock and key in the cabinet in his office.

[14] PW4 packed and sealed the two plastic packages, exhs. P15(1) and (2) in the box marked "EA", exh. P14 and another two plastic packages, exhs. P17(1) and (2) were packed and sealed in the box marked "EB", exh. P16.

[15] On 31 October 2011 all the packages were sent to the Chemistry Department for analysis. On analysis of the contents of the packages, Dr Vanitha a/p Kunalan (PW3), the Government chemist confirmed as follows:

(i) the two plastic packages in the box marked "EA", exh. P14 contained 1,322.4g of methamphetamines; and

(ii) the two plastic packages in the box marked "EB", exh. P16 contained 1,427.4g of methamphetamines,

thereby making a total of 2,749.8g of methamphetamines. Methamphetamine is listed in the First Schedule of the Dangerous Drugs Act 1952.

[16] Some items of clothing from the bags were also sent to the Chemistry Department for DNA testing. On analysis, the trace DNA on the shirt marked "EB2", exh. P24A which was found in one of the Samsonite bags, exh. P41 was consistent with the DNA profiling of the respondent.

Findings Of The Trial Judge At The Close Of The Prosecution's Case

(a) At the close of the prosecution's case, it is for the prosecution to prove the charge against the respondent on the *prima facie* basis;

(b) The trial judge had no reasons to disbelieve the evidence led by the prosecution. The prosecution witnesses had no reason to lie in court;

(c) It was clear that the bags, in which the drugs were found belonged to the respondent. The baggage claim tickets were tallied with the tags on the bags. The keys to the bags were found on the respondent. The prosecution had clearly proved that the respondent had custody and control as well as knowledge of the dangerous drugs found in both the bags;

(d) The amount of the drugs itself raises the statutory presumption of trafficking under s. 37(da) of the Act.

[17] The trial judge was satisfied that the prosecution had proved the charge of trafficking in dangerous drugs against the respondent. A *prima facie* case had been made out and the defence was called.

The Defence Case

[18] The respondent elected to give evidence on oath. He was the sole witness for the defence.

[19] The respondent explained that he was late to claim the two Samsonite bags because he was detained at the immigration lock up after being questioned by the immigration officers. He was released at about 6am.

[20] The respondent admitted that he was brought to the "lost and found" counter to retrieve the two Samsonite bags he had checked in. However, the respondent denied that the keys to the two bags were recovered from his pocket. According to the respondent, the keys were found in the pockets of the bags themselves.

[21] Although the respondent did not deny that the bags were brought by him into Malaysia, he however, denied the bags belonged to him. According to the respondent, the two Samsonite bags were given to him by an acquaintance by the name of Olga to be given to Olga's brother in Malaysia.

[22] The respondent received the bags from Olga at the Lagos International Airport. The respondent said that he had no reason to suspect the bags contained anything illegal as the bags were opened and cleared by the customs in Lagos.

[23] The respondent denied that he had any knowledge of the drugs in the bags and he only came to know of the drugs after both the bags were examined by the police and the four brown packages were recovered. The respondent denied having knowledge of the four brown packages.

[24] The respondent further testified that his own personal clothing were brought in a separate bag, that is, a computer bag. The computer bag was not produced by the prosecution and in fact, PW2 had denied in cross-examination that there was any such bag.

[25] The respondent told the court that the computer bag was in fact in his possession and he could produce the same in court. The said bag was produced and marked as exh. D60.

[26] The bag, exh. D60 contained the respondent's clothing. The respondent pointed to the marking on the bag made by the prisons authority indicating that the bag was taken with him on admission to the prison.

[27] The respondent also testified that the police had taken out some item of clothing from his computer bag and placed them in the two Samsonite bags from which the drugs were found.

Evaluation Of The Defence Case By The Trial Judge

(a) The trial judge gave credence to the fact that the respondent had not merely denied but had produced evidence to rebut the testimony of the prosecution witnesses;

(b) The defence of the respondent could not be brushed aside as an afterthought as the gist of his testimony in court was consistent with his cautioned statement, exh. D59;

(c) By producing the bag which the police claimed it was never existed put into the spotlight the credibility of the prosecution witnesses especially that of PW2 and PW4;

(d) The production of the bag also answered the contention of the prosecution that it was illogical for the respondent to come to Malaysia by bringing the bags belonging to someone else, while at the same time he did not bring his own personal clothing;

(e) With the production of the bag containing his personal belongings, this made the testimony of the respondent plausible that the two Samsonite bags containing the drugs did not belong to him at all;

(f) The IO, PW4 in this case also made no attempt to verify the testimony of the respondent contained in his cautioned statement, D59, especially on the existence of the person called Olga, or the very least the police could have confirmed whether the compartment bound baggage of the passengers/travellers are checked by the customs in Lagos before departure as contended by the respondent;

(g) The production of the bag, exh. D60 went further to bolster the contention of the respondent that the police had planted his personal clothing from the bag into the two Samsonite bags containing the drugs. This explained the presence of the respondent's DNA on the shirt marked "EB2", exh. P24A which was recovered from the Samsonite bag, exh. P41;

(h) Further, in light of the testimony of the respondent, his behaviour of being evasive, uncooperative and fearful could not raise an inference of knowledge of the drugs in the bags because such conduct could easily be consistent with his innocence and anger of being made use of by Olga.

The Appeal

[28] Before us, learned deputy advanced two grounds of appeal, namely:

(a) The trial judge had misdirected himself when he found that the existence of the computer bag, exh. D60 had affected the credibility of the prosecution witnesses. At p. 12 paras. 30 and 31 of the appeal record, vol. 1, the trial judge found:

> 30. By producing the bag which the police claimed never existed put into the spotlight the credibility of the prosecution witnesses especially that of PW2 and PW4;
>
> 31. The production of the bag also answered the contention of the prosecution that it was illogical for the accused to come to Malaysia by bringing the bags belonging to someone else while at the same time not bringing his own personal clothing.

(b) Having heard the testimony of the respondent, the trial judge had misdirected himself when he found that the respondent had no knowledge of the drugs. At p. 13 para. 35 of the appeal record, vol. 1, the trial judge found:

> 35. In the light of the testimony of the accused also, his behaviour of being evasive, uncooperative and fearful could not raise an inference of knowledge of the drugs found. Such conduct could easily be consonant with innocence and anger of being made use of by the person called Olga.

Our Decision

[29] Having called the defence and heard the testimony of the respondent, the trial judge found that the respondent in producing the bag, exh. D60 had cast doubt on the credibility of the two main prosecution witnesses, namely, PW2 and PW4.

[30] Learned deputy, however, argued that the production of the bag, exh. D60 did not affect the credibility of PW2 and PW4. Because the existence of the exh. D60 was only disclosed at the late stage during the re-examination of the respondent. The exh. D60 was never shown to PW2 and PW4 in its original, physical form at the trial during the prosecution's stage to seek their explanations or clarifications. It is the duty of the defence to put to PW2 that his testimony regarding the non-existence of exh. D60 is untrue. In *Tan Kim Ho & Anor v. PP* [2009] 3 CLJ 236, the Federal Court observed as follows:

> Even if the plaintiff's or prosecution's witness does not say anything relating to the defence case, it is still the duty of the defence to bring out his case during plaintiff's or prosecution's case. In fact this duty to disclose his defence during the prosecution's case is more relevant in criminal cases than in civil. This is particularly so when the plaintiff or prosecution's witness is relevant to the fact in issue. In criminal cases, the prosecution does not know what the defence is going to be, except in alibi, until the defence adduces its evidence.

[31] If the respondent's defence was to have any credence, the defence must show and produced exh. D60 to PW2 and PW4 during their examination-in-chief and not merely suggesting to them (ie, PW2 and PW4) in cross examination. Mere suggestions in cross-examination are evidence and remain mere suggestions. In *Mirza Mutala v. PP* [2010] 4 CLJ 150; [2010] 5 MLJ 616 at p. 162 (CLJ); p. 625 (MLJ), this court said as follows:

> [19] With regard to this we are conscious of the trite principle of law that suggestions made to the prosecution's witnesses at the prosecution's stage by the defence are not evidence and remains mere suggestions – see *PP v. Dato' Seri Anwar bin Ibrahim (No. 3)* [1999] 2 MLJ 1 approving *Emperor v. Karimuddi Sheikh* AIR 1932 Cal 373.

[32] In cross-examination of the respondent, it was categorically challenged by the learned deputy that there was no other bag other than the two Samsonite bags, exhs. P40 and P41. It was disagreed by the respondent. The challenge and reply at p. 93 of the appeal record, vol. 1 ran as follows:

Q I put it to you that there is no other bag except these 2 bags (ie, exhibits P40 and P41) with you.

A Disagree.

[33] The other bag, exh. D60 (other than exhs. P40 and P41) was produced at the tail end of the re-examination of the respondent by learned counsel as can be seen at pp. 94 and 95 of the appeal record, vol. 1. The notes of proceeding recorded *inter alia*, as follows:

Q	You disagree that there were only 2 bags in this case. Explain to us. Any other bag?
A	I disagree because I brought 3 bags and among the 3 bags I brought one of them is still in this lock up here. When I arrive in prison I still carry the same bag.
Mkh	No, now you are saying the bag was in the lock up?
A	Yes
Mkh	You seen the bag in the lock up here?
A	Yes
Mkh	Can you take him to the lock up and show where? When did you see the bag in the lock up? Today you saw in lock up?
A	I brought it myself from the prison to the court. Today.
Mkh	Now, it's down there.
A	Yes
Q	Mana lock up di sini?
A	Down stair lock up.
Mkh	So, this was the same bag you brought.
A	Yes, that was belonging was inside.
Q	The one you referred earlier that were return back to you empty?
A	Yes
Mkh	But what the prosecution evidence? Only this 2 bags isn't it?
DPP	Yes
P/B	Yes but I challenge that
Mkh	Now, bawa dia ke lock up, saya nak tengok bag tu.
Mkh	Tangguh sebentar.

t.t: Dato' Haji Akhtar bin Tahir

A 3.57 petang (kes dipanggil semula)
Pihak-pihak yang sama
Saksi diingatkan masih dalam sumpah

Sambung Pemeriksaan Semula Peguambela

Mkh So it (this) is a bag. You want tender this?

B

P/B Yes

Mkh P60 (it should read D60)

Q There are marking on the bag, does he know from where comes the mark? Marking in liquid.

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A This is the number they register in prison when the day I bring (brought).

[34] From the respondent's evidence alluded above, exh. D60 was adduced physically as exhibit by the respondent, very late in the day in the trial proceedings. To be exact, it was introduced by the respondent during

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re-examination by his counsel. In itself, *ipso facto*, nothing adverse may be said against such a stance. If an exhibit needed to be adduced, it may be adduced at any time, with good reason explaining any delay. But having said that, any evidence, especially important and material exhibit, must be adduced at the earliest reasonable opportunity by the party desirous of

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admitting it as evidence in court. Reverting to the factual circumstances in this case, it must be emphasised here that the learned deputy had challenged the admission of this computer bag. It was put by him to the respondent that exh. D60 did not exist. The respondent disagreed and after viewing exh. D60, it was admitted by the trial judge. It was accordingly marked as exh.

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D60.

[35] The origin of exh. D60 is suspect. It was not clear at all how it had ended up in the lock-up below the courtroom and whose physical existence was only brought to light during the re-examination of the respondent. Apart from the oral evidence of the respondent who testified that he had brought

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the bag exh. D60 from the prison on the day of trial, there is no clear and cogent evidence as to the whereabouts of the bag prior to it being produced so late in the day in court.

[36] The tendering of the computer bag as exh. D60 and its admissibility as a court exhibit was done without much deliberation. For instance, the

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white marking that apparently appeared on the bag was summarily accepted as being marking made by the prisons authority when the respondent had allegedly surrendered it to the prisons authority when he was admitted as a remand prisoner while awaiting trial for this case. No record of the same as having been inventoried by the prisons authority was adduced by the

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respondent. On admission to prison, the respondent's clothes, money and other articles, including exh. D60 must have been taken from him and then inventoried in the Register of Prisoners' Effects: see reg. 14 of the Prisons

Regulations 2000. Neither was any prison officer in-charge of the inventory that kept and released the bag called to testify and to identify the bag and the white markings on the bag that was accepted by the trial judge as marking attributable to the prisons authority. At the same time, it may be noted that according to the respondent, the bag was also registered by the immigration authority when he was at the KLIA on the day of his arrest. Subsequently, he said that the bag was also registered with the prisons authority. To our mind, since the bag had been registered with two authorities referred to above, evidence must be adduced by him to show the trail covered by the bag, exh. D60 that had since been admitted as evidence for the defence. To be fair to the learned deputy, the court proceedings recorded during the cross-examination and re-examination clearly showed that he had challenged the bag, exh. D60 as one that did not exist. On such objection by the prosecution, it had become incumbent to our mind, on the defence to adduce affirmative evidence regarding the bag, exh. D60.

[37] The law on the admissibility of evidence applies with equal force on all litigants. In limited circumstances, such as where it is exempted or relaxed by statute, or where there is no challenge (inapplicable in criminal proceedings), admissibility of a piece of evidence will require to undergo the tedious and rigorous but necessary process of proof by the party desirous of admitting it as evidence in court.

[38] Our view is also based on the fact that the respondent was facing a charge where a statutory presumption of trafficking was operating against him, as was rightly invoked by the trial judge in view of the proven weight of the impugned drugs. In such a scenario, it will not be sufficient for the respondent to just raise a reasonable doubt in order to gain an acquittal. A long line of cases of high authority has established the legal position that where an accused person is faced with a statutory presumption, it is incumbent upon him in law, to rebut that statutory presumption on the balance of probability. Nothing short the required proof would suffice to discharge that burden (see the Privy Council case of *PP v. Yuvaraj* [1968] 1 LNS 115; [1968] 1 MLJ 238).

[39] As to what a standard of proof on the balance of probabilities would entail, it would be better understood by referring to the English family case of *In re H (Minors)* [1996] AC 563 at 586 where Lord Nicholls of the then House of Lords had explained as follows:

> The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not … Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation. Although the result is much the same, this does not mean that where a serious allegation is in issue the standard of proof required is higher. It means only that the inherent probability or

A improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established.

B **[40]** Apart from the issue of admissibility of the bag, exh. D60, from a perusal of the defence evidence surrounding exh. D60, with respect, the trial judge was in error when he ruled that the existence of exh. D60 had successfully cast a reasonable doubt on the prosecution case, rendering their evidence unreliable on the existence of the two bags, as opposed to three bags.

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[41] The law is trite. Admissibility of a piece of evidence does not automatically equate impeccable credibility of the same. Its credibility must be subjected to it being tested with other admissible evidence adduced in court. It has to be considered in the totality of the evidence and not in isolation.

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[42] At this juncture, it would be opportune to examine the evidence pertaining to the bag, exh. D60 in light of the overall evidence throughout the trial. It would be quite easy to discern that exh. D60 is not in the nature of a stand-alone kind of evidence. It is inter-linked with other crucial evidence in the overall evidence of this case. Indeed, it was critical in the context of the case for the respondent.

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[43] The following observations may be made. First, at the point of the first search at the KLIA on the day of the respondent's arrest by PW2, only two Samsonite luggage bags, exhs. P40 and P41 were seized and searched, after they had been identified by the respondent to be his. Indeed the names on the baggage tags tallied with the name of the respondent as per his international passport. It was the evidence of PW2 that when he was about to examine the contents of the bags, the respondent had then denied the bags were his. At that point in time, there was no mention of the computer bag.

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G Neither PW2 noticed the computer bag, nor indicated to him by the respondent. That would have been the first opportunity for the respondent to inform PW2 that there was another bag, exh. D60, if indeed there was one. But only two bags were mentioned. Only two bags were listed in the search list exh. P11 that was acknowledged and signed by the respondent.

H There was no indication in the search list that the respondent had wanted to add to the list that there was another bag, exh. D60 which was not listed therein. That would have been the second opportunity for him to protest to PW2.

[44] The respondent gave a cautioned statement, exh. D59 and it was

I tendered as evidence by the respondent. The exh. D59 was not without incongruity. It was recorded on 5 October 2011 which was prior to his arrest. He was arrested on 9 October 2011. The respondent denied his signature in

it but admitted its contents. Be that as it may, a perusal of exh. D59 disclosed no reference to the computer bag. That had represented the third opportunity for the respondent to inform the recording officer about the existence of the computer bag and its whereabouts. Nothing was said about the computer bag then. It was silent. Instead, the story about Olga was adverted to in exh. D59 and how Olga had given the two bags to the respondent in Nigeria, for onward transmission to Olga's brother in Kuala Lumpur. No particulars were given about Olga, neither the particulars of Olga's brother who was allegedly in Kuala Lumpur. He could not be said to have given an "*Alcontara* notice." The character Olga is a fiction of the respondent's imagination.

[45] During the cross-examination of PW2, for the first time, the matter about the alleged computer bag and what had happened to its contents was brought up. Apart from stating the existence of exh. D60 and how PW2 had allegedly taken out personal clothing of the respondent and had them transferred into the two bags, the very bag exh. D60 was never shown to PW2 throughout the course of PW2's cross-examination. Neither was there any indication given by the respondent as to where the computer bag was at that point in time, or that he would be producing it in court in due course. Neither did the respondent inform the court that he had difficulty in bringing the computer bag from the prison. That was the fourth opportunity for the respondent to present to the court a very crucial piece of exhibit, namely exh. D60. We said so because it was part of the prosecution case that a shirt, marked "EB2", exh. P24A was seized from the Samsonite bag, exh. P41. The shirt marked "EB2", exh. P24A was then sent to the Government chemist for DNA analysis and had since found to produce a positive result. The DNA of the respondent had matched with a DNA profiled from the respondent's shirt marked "EB2", exh. P24A. It was noted that the respondent did not, during cross-examination of PW2, put it to PW2 that the computer bag was inventoried by the prisons authority when he was first admitted to the prison as a remand prisoner while awaiting the trial into this case. Neither did it appear in the notes of proceedings that at any time during the course of the prosecution's case that the respondent had voluntarily informed the court, either by himself or through his counsel, that his computer bag was in fact kept in safe custody by the prisons authority. That was another opportunity that had gone a begging. In the case of *Tan Kim Ho & Anor v. PP* [2009] 3 CLJ 236, the Federal Court had occasion to state the following:

> Even if the plaintiff's or prosecution witness does not say anything relating to the defence case, it is still the duty of the defence to bring out his case during the plaintiff's or prosecution's case. In fact this duty to disclose his defence during the prosecution's case is more relevant in criminal cases than in civil cases. This is particularly so when the plaintiff's or the prosecution's witness is relevant to the fact in issue. In criminal cases, the prosecution does not know what the defence is going to be, except in *alibi*, until the defence adduces its evidence.

[46] Merely by putting the matter of the computer bag to the prosecution witness without more, would not suffice. By producing the computer bag, exh. D60 to the prosecution's witness when they were under cross-examination, a fuller and more useful ventilation pertaining to exh. D60 would have been made possible. If indeed exhibit D60 was in existence and available then, it ought to have been produced in court and PW2 ought to have been confronted with it accordingly. But the respondent had not done so and no explanation was given as to why the bag was not produced and shown to the witness. It was also never put by the respondent to PW2 and PW4 that the shirt marked "EB2", exh. P24A had originated from exh. D60.

[47] Then, when the defence was called, and rightly so, by the trial judge, the respondent took the witness stand. He was the only witness for the defence to the present charge of drug trafficking. The presumption of trafficking was invoked against him. His burden was to rebut that presumption on the balance of probabilities. During the course of examination-in-chief, the respondent alluded to the existence of the computer bag, exh. D60. But he did not produce that bag at that stage of the proceedings. Again, an opportunity to produce was not seized. During cross-examination by the learned deputy, again exh. D60 was not produced. But, during re-examination of the respondent, suddenly he told the court that the computer bag was in the police lock-up within the court's premise. It was produced in court as exh. D60, although the learned deputy had challenged it as being untrue and an afterthought. When asked by the learned defence counsel on the white 'marking in liquid' on the bag, the respondent said that "this is the number they register in prison when the day I bring." No evidence was led as to how the computer bag could have found its way from the safe custody of the prisons authority, if indeed it was inventoried with the prisons authority as alleged by the respondent. No documentary evidence from the prisons authority was tendered in court to show that indeed exh. D60 was all the while in their custody. If it was so inventoried, evidence ought to have been adduced to reflect the same. An official record of the same must be produced in court as evidence of the same.

[48] With the admission of exh. D60 in evidence, the learned trial judge had ruled that the respondent had raised a reasonable doubt in the prosecution case. The credibility of PW2 and PW4 was put into a spotlight and the production of the bag exh. D60 had "also answered the contention of the prosecution that that it was illogical for the accused to come to Malaysia by bringing the bags belonging to someone else while at the same time not bringing his own personal clothing."

[49] With respect, having traced the historical journey of the computer bag, exh. D60 in the overall scheme of the entire evidence in this case, it is our considered view that the bag was a convenient afterthought hatched by the respondent (see the judgment of learned Justice Edgar Joseph in the case of *Alcontara Ambross Anthony v. PP* [1996] 1 CLJ 705 for afterthought).

[50] The exh. D60 and its production in court was a creation by the respondent. It was manufactured to deflect the incriminating fact concerning the shirt marked "EB2", exh. P24A which was confirmed by the Government chemist, PW3 to have contained the matching DNA profile of the respondent. It was a plan that was quite ingeniously manoeuvred that however could not stand curial scrutiny, in light of the overall evidence. The whole thing surrounding exh. D60 had lacked credibility as it smacked of an afterthought. It could not, in our view, cast any doubt on the veracity of the prosecution's evidence of PW2 and PW4 that there were only two bags seized in this case, not three as belatedly alleged by the respondent.

[51] In light of the foregoing, it is our view that exh. D60 had failed to rebut the statutory presumption of trafficking under s. 37(da) of the Act that was invoked against him. The exh. D60 in itself was clearly unreliable as a piece of evidence. Its probative value, in the circumstances of this case, at the highest, can only be regarded as being highly suspect. Such evidence, to our mind, can never rebut a statutory presumption. We were not in agreement with the trial judge who found that the production of exh. D60 had demolished the credibility of PW2 and PW4 and fatal to the prosecution's case.

[52] Further, the conduct of the respondent had betrayed him. His conduct is admissible under s. 8 of the Evidence Act 1950 (see: *Parlan Dadeh v. PP* [2009] 1 CLJ 717; [2008] 6 MLJ 19). The respondent's conduct prior to his arrest may be listed as follows:

(i) his facial expression changes,

(ii) he showed sign of nervousness,

(iii) initially he admitted that the two bags exhs. P40 and P41 belonged to him but in the next breadth, he denied that the bags were his when PW2 was about to inspect them; and

(iv) he refused to cooperate and to open the bags, exhs. P40 and P41.

[53] The cumulative conduct of the respondent was consistent with his having known of the presence of the drugs concealed in both the bags exhs. P40 and P41 before their discovery, indicating thereby a sense of guilt. It is not consistent with his innocence and frustration to vent his anger onto Olga who had duped him, contrary to the finding made by the trial judge. The conduct of being evasive, uncooperative and nervousness was consistent with the respondent's conduct of a deliberate refusal or reluctance to uncover the drugs which he knew hidden in exhs. P40 and P41. If his anger was targeted at Olga, it was reasonable for him to immediately burst out Olga's identity and particulars to PW2, when PW2 discovered the drugs in the bags at the narcotics office at the KLIA. But no such spontaneous and vehement protest from the respondent. The respondent had failed to rebut the prosecution evidence of conduct under s. 9 of the Evidence Act.

[54] Having considered and assessed the respondent's defence of innocent carrier which he claimed of having no knowledge of the drugs in both the Samsonite bags exhs. P40 and P41 and that he was being duped by Olga was unpersuasive or did not convince us at all with his story. We, therefore, rejected the respondent's defence of innocent carrier.

[55] The trial judge had also taken the IO to ask for not making any attempt to verify the contents of exh. D59 pertaining to Olga. The reason is this. At the risk of repetition, the full particulars of Olga were not furnished to the IO. Nothing much can be done to trace and locate Olga who is in Lagos, Nigeria. His brother who was said to be in Malaysia is equally untraceable. His identity, name, address and phone number was not available. To locate them are just like chasing a shadow. It will be an endless effort and futile exercise.

[56] The trial judge too expected the police to confirm whether the bags of the passengers were checked by the customs in Lagos as contended by the respondent. To this contention, our experience tells us that the passengers' compartment baggage (as oppose to hand carry bags) are not ordinarily examine by the customs before departure. The compartment baggage are check in at the check in counter, weigh them and the conveyer belt will ultimately take them to the baggage compartment of the plane. Only the hand carry bags are carried and put them through the scanner. The baggage will only be searched, if adverse information is received, upon arrival at the destination, in this case, at the KLIA.

[57] To conclude, the trial judge's finding of no knowledge of the impugned drug by the respondent and ordered his acquittal at the conclusion of the trial was clearly against the weight of evidence. As such, we are entitled to form our own independent view on the facts and circumstances of this case that the trial judge was plainly wrong in ordering the respondent's acquittal. Therefore, such erroneous conclusion by the trial judge warranted our interference.

Conclusion

[58] Accordingly, we set aside the decision to acquit and discharge the respondent by the trial judge. In its place, we substitute it with the conviction and sentence of death by hanging in compliance with s. 277 of the Criminal Procedure Code.